187

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Supreme Court, U.S.
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In The
Supreme Court of the United States

MCI SALES AND SERVICE, INC., et al.,

Petitioners,

v.

JAMES HINTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

REPLY BRIEF

J. Brett Busby
BRACEWELL & GIULIANI LLP
711 Louisiana Street,
Suite 2300
Houston, Texas 77002

Darrell L. Barger
HARTLINE DACUS BARGER
DREYER LLP
North Tower
800 N. Shoreline Blvd.,
Suite 2000
Corpus Christi, Texas
78401

John C. Dacus
HARTLINE DACUS BARGER
DREYER LLP
6688 N. Central Expressway,
Suite 1000
Dallas, Texas 75206

Thomas C. Wright
Counsel of Record
Wanda McKee Fowler
Michael Choyke
Bradley W. Snead
WRIGHT & CLOSE, LLP
Three Riverway, Suite 600
Houston, Texas 77056
Telephone: (713) 572-4321
Facsimile: (713) 572-4320
wright@wrightclose.com

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. The Texas Supreme Court's decision conflicts with those of other lower courts and with prior decisions of this Court..... 2

A. *Williamson* does not resolve the conflict over the preemptive effect of the glazing standard in FMVSS 205 2

B. The Texas Supreme Court's non-preemption holding on the seatbelt standard in FMVSS 208 conflicts with decisions of this Court and lower courts 4

C. The Texas Supreme Court's decision conflicts with this Court's implied-preemption decisions 5

II. The Texas Supreme Court erred in rejecting preemption..... 7

A. FMVSS 205 preempts the glazing claim 7

B. FMVSS 208 preempts the seatbelt claim 9

1. FMVSS 208 is not silent with respect to passenger seatbelts on motorcoaches 9

TABLE OF CONTENTS – Continued

Page

2. FMVSS 208's regulatory history does not show inaction; it shows a decision not to require passenger seatbelts on motorcoaches 11

3. NHTSA's decision not to require passenger seatbelts was a significant objective 12

PRAYER 14

TABLE OF AUTHORITIES

Page

CASES

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) ..... *passim*

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) ..... *passim*

Lake v. Memphis Landsmen, L.L.C., No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200 (Tenn. Ct. App. Mar. 15, 2010) 3, 8, 9

Morgan v. Ford Motor Co., 680 S.E.2d 77 (W. Va. 2009) 3, 8, 9

Priester v. Cromer, 697 S.E.2d 567 (S.C. 2010), *vacated and remanded*, 131 S. Ct. 1570 (2011) 8, 9

Priester v. Ford Motor Co., 131 S. Ct. 1570 (2011) 1

Raley v. Hyundai Motor Co., No. CIV-08-0376-HE, 2010 U.S. Dist. LEXIS 3056 (W.D. Okla. Jan. 14, 2010) 8

Smith v. BAC Home Loans Servicing, No. 2:10-cv-00354, 2011 U.S. Dist. LEXIS 26104 (S.D. W. Va. Mar. 11, 2011) 3

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ..... *passim*

Surles v. Greyhound Lines, Inc., No. 4:01-cv-00107, 2005 U.S. Dist. LEXIS 45765 (E.D. Tenn. 2005) 13

Tiller v. Ford Motor Co., No. 3:03-cv-489-J-32HTS, 2006 U.S. Dist. LEXIS 4196 (M.D. Fla. 2006) 8

TABLE OF AUTHORITIES – Continued

Page

Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) ..... *passim*

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 6

OTHER AUTHORITIES

Wilke et al., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT viii and x (Aug. 21, 2001) 8

REGULATIONS

49 C.F.R. § 571.101 11

49 C.F.R. § 571.102 11

49 C.F.R. § 571.103 11

49 C.F.R. § 571.104 11

49 C.F.R. § 571.105 11

49 C.F.R. § 571.106 11

49 C.F.R. § 571.108 11

49 C.F.R. § 571.111 11

49 C.F.R. § 571.113 11

49 C.F.R. § 571.116 11

49 C.F.R. § 571.120 11

49 C.F.R. § 571.121 11

49 C.F.R. § 571.124 11

49 C.F.R. § 571.125 11

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R. § 571.126 11
49 C.F.R. § 571.201 10
49 C.F.R. § 571.202 10
49 C.F.R. § 571.204 11
49 C.F.R. § 571.205 11
49 C.F.R. § 571.207 10
49 C.F.R. § 571.208 ..... 9, 10
49 C.F.R. § 571.214 10
49 C.F.R. § 571.216 10
49 C.F.R. § 571.217 11
49 C.F.R. § 571.302 11
38 Fed. Reg. 4776 (Feb. 22, 1973) 11, 13
ANSI/SAE Z26.1–1996 7

Respondents do not dispute that MCI's petition offers a good vehicle for resolving important federal issues with broad ramifications: the preemptive effect of two federal motor vehicle safety standards on state common-law design-defect claims against a motorcoach manufacturer. Nor do they dispute that the Texas Supreme Court's decision conflicts with decisions from other courts around the country on these issues, or that uniformity is especially necessary in this context because motorcoaches frequently travel between states. Instead, Respondents argue that MCI's petition should be denied because the Texas court's decision was correct. (Opp. 4, 23, 27) MCI of course strongly disagrees with Respondents on the merits, but, in any event, their merits arguments do not diminish the need for this Court to resolve the conflicts.

Respondents also argue that this Court resolved one of these conflicts in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011). But *Williamson*, which involved a different regulation and was decided after this case, only clarifies the analysis. It does not resolve the lower courts' disagreement about the objective of the glazing regulation in FMVSS 205. This Court should grant certiorari to resolve the conflict. Alternatively, the Court should, as it did in *Priester v. Ford Motor Co.*, 131 S. Ct. 1570 (2011), grant certiorari, vacate the judgment, and remand to the Texas Supreme Court for further consideration in light of *Williamson*.

I. The Texas Supreme Court's decision conflicts with those of other lower courts and with prior decisions of this Court.

Rather than dispute or minimize the conflicts that exist among lower courts over the application of conflict preemption to FMVSS 205 and FMVSS 208, Respondents contend that *Williamson* resolved one of the conflicts, and that the decision below is consistent with this Court's previous decisions. But important conflicts remain.

A. *Williamson* does not resolve the conflict over the preemptive effect of the glazing standard in FMVSS 205.

In *Geier v. American Honda Motor Co.*, this Court held that a common-law tort claim against an automobile manufacturer for not installing airbags stood as an obstacle to accomplishment of the objective behind a portion of FMVSS 208 that "sought a gradually developing mix of alternative passive restraint devices." 529 U.S. 861, 886 (2000). Therefore, the common-law claim was preempted. *Id.*

As Respondents concede, several courts have since "struggled with the extent to which *Geier*'s reasoning applied to FMVSS 205"—a safety standard that gives motor vehicle manufacturers a choice between multiple glazing options in side passenger windows. (Opp. 7) *Williamson*, which involved a different portion of FMVSS 208 than in *Geier* or this case, provides some guidance by clarifying that the

choice must be a "significant objective" of the regulation. 131 S. Ct. at 1134. As one federal district court recently explained, *Williamson* "refined the parameters of obstacle preemption," holding that preemption "turns on an essential threshold showing—that 'a significant objective of a federal regulation' be identified." *Smith v. BAC Home Loans Servicing*, No. 2:10-cv-00354, 2011 U.S. Dist. LEXIS 26104 (S.D. W. Va. Mar. 11, 2011) (alterations omitted).

But *Williamson* does not resolve the conflict over FMVSS 205. Respondents acknowledge as much by noting that "[t]he question is whether the choice afforded by FMVSS 205 is a '*Geier* choice' or a '*Williamson* choice.'" (Opp. 3) The Texas Supreme Court concluded that the choice provided in FMVSS 205 was not a "*Geier*-like policy decision" and, thus, did not preempt Respondents' claims. (Pet. App. 43) But the court's holding was based primarily on its erroneous assumption that all safety standards are "minimum standards" (*id.* at 38–39) and its conclusion that FMVSS 205 "does not state a positive desire to preserve the use of tempered glass." (*Id.* at 43–44) Other courts have disagreed, concluding that FMVSS 205 reflects a deliberate objective, for safety reasons, to provide manufacturers a range of options. *See Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94–95 (W. Va. 2009); *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200, at *24–26 (Tenn. Ct. App. Mar. 15, 2010).

The conflict in these cases is over NHTSA's objective behind the glazing regulation in FMVSS

205—an issue that *Williamson* does not address. If the latter courts have interpreted NHTSA's objective correctly, then, under *Williamson*, the objective was significant and FMVSS 205 has preemptive force. (Pet. 26–30) The Court should grant certiorari to resolve this continuing conflict.

B. The Texas Supreme Court's non-preemption holding on the seatbelt standard in FMVSS 208 conflicts with decisions of this Court and lower courts.

Respondents likewise do not dispute that the Texas Supreme Court's holding on FMVSS 208—that the seatbelt standard does not preempt Respondents' claims—conflicts with at least four lower court decisions. (Pet. 19–20) Respondents assert instead that the Texas court's decision is consistent with this Court's holdings in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). But those cases predate the conflicting lower court decisions and have not prevented the conflict from developing.

Moreover, *Sprietsma* and *Freightliner* do not apply here because those cases involved true regulatory silence while this case involves a deliberate agency decision. As discussed below, an agency decision that thoroughly considered the issue and chose not to require passenger seatbelts, based on safety reasons, is different from the complete absence of a

regulation. Because the Texas Supreme Court incorrectly applied *Sprietsma* and *Freightliner* to a case not involving regulatory silence, its seatbelt holding is in conflict with prior decisions of this Court.

C. The Texas Supreme Court's decision conflicts with this Court's implied-preemption decisions.

The Texas court emphasizes—in both its glazing and seatbelt holdings—that there must be some expression of the agency's intent to preempt common-law claims. Requiring an expression of preemptive intent directly conflicts with this Court's implied-preemption analysis, as articulated in *Geier* and *Williamson*. If allowed to stand, the Texas Supreme Court's decision may be used by courts in Texas and elsewhere to further limit or eliminate implied preemption altogether.

In response, Respondents mischaracterize MCI's position as "suggest[ing] the implied preemption analysis differs depending on the underlying federal statute at issue." (Opp. 23) That misunderstands MCI's point. As articulated in *Geier* and *Williamson*, there is a single conflict-preemption framework that applies to all federal statutes. But the language and history of the particular statute or federal regulation can affect how that analysis is applied. This is, in part, because courts must focus on the objective behind the federal regulation.

For example, *Geier* explains that the National Traffic and Motor Vehicle Safety Act has a "neutral policy" towards preemption because it contains an express preemption provision and a saving clause. 529 U.S. at 870. *Sprietsma* explains that there is essentially no implied preemption under the Boat Safety Act—even though it has those same provisions—because of that Act's unique regulatory history, in which the Coast Guard expressed a desire for states to regulate areas not expressly regulated by the Act. 537 U.S. at 65–66. *Wyeth v. Levine* explains that it is significant that the Federal Food, Drug, and Cosmetic Act contains a saving clause but no relevant express preemption provision. 129 S. Ct. 1187, 1200 (2009).

Thus, although the conflict-preemption doctrine is the same, it applies differently depending on the text of a statute and its regulatory history. The Texas Supreme Court did not appreciate this distinction and, instead, applied the presumption against preemption and minimized implied preemption by focusing on the perceived absence of affirmative statements of preemptive intent in the regulation. This Court should grant certiorari to clarify the viability of implied preemption.

II. The Texas Supreme Court erred in rejecting preemption.

A. FMVSS 205 preempts the glazing claim.

Unlike the regulation in *Williamson*, the choice provided to manufacturers in FMVSS 205 served a significant safety objective.[1] In *Williamson*, the agency expressed a desire for three-point seatbelts but gave manufacturers the choice between two-point and three-point seatbelts because of cost concerns. 131 S. Ct. at 1138. In contrast, under FMVSS 205, NHTSA recognized that no one type of glazing is always desirable over another. It depends on the type of accident:

> One safety glazing material may be superior for protection against one type of *hazard*, whereas another may be superior against another type. Since *accident conditions* are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.

ANSI/SAE Z26.1–1996 § 2.2 (emphasis added). This section undermines Respondents' position that one type of material is best for passenger cars, another type for sports utility vehicles, and yet another for

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[1] It is important to emphasize that the regulation in *Geier* is only one example of a choice that is a significant objective. It is not the only choice regulation that can have preemptive effect. But under the Texas Supreme Court's decision, *Geier* would be limited to its exact facts, good for that day only. (Pet. 14, 20–21)

motorcoaches.[2] (*See* Opp. 6) NHTSA's view was that the safety difference between the glazing materials depends upon the type of accident, not the type of vehicle.

Properly understood, FMVSS 205 explains that one type of material (tempered glass) may be better for front and side-impact collisions while another (laminated glass) may be better for rollover accidents.[3] If the glazing regulation in FMVSS 205 does not have preemptive effect, a vehicle manufacturer would have a potential Hobson's choice: install laminated glass and be subject to lawsuits involving the most common collisions (front and side impact) or install tempered glass and be subject to lawsuits involving the least common collisions (rollovers).

As the courts note in *Priester*, *Morgan*, and *Lake*, NHTSA chose not to require laminated glass—and instead gave a choice among glazing materials—because of safety concerns about increased neck

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[2] Although Respondents suggest that tempered glass may be the better choice in passenger cars (Opp. 6), plaintiffs in other cases have sued passenger car manufacturers for installing tempered glass in passenger car side windows. *See, e.g., Raley v. Hyundai Motor Co.*, No. CIV-08-0376-HE, 2010 U.S. Dist. LEXIS 3056, at *1–2 (W.D. Okla. Jan. 14, 2010) (1999 Hyundai Sonata); *Tiller v. Ford Motor Co.*, No. 3:03-cv-489-J-32HTS, 2006 U.S. Dist. LEXIS 4196, at *32 (M.D. Fla. 2006) (1995 Lincoln Town Car).

[3] *See* Wilke et al., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT viii and x (Aug. 21, 2001) (noting that laminated glass "increases the risk of neck injury").

injuries. *Priester v. Cromer*, 697 S.E.2d 567, 570 (S.C. 2010), *vacated and remanded*, 131 S. Ct. 1570 (2011) (noting NHTSA finding of increased safety risk of laminated glass for belted occupants); *Morgan*, 680 S.E.2d at 79 (finding "NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns"); *Lake*, 2010 Tenn. App. LEXIS 200, at *24–26 (noting choice was both a cost and safety decision). A choice based on safety concerns is a significant regulatory objective and, thus, FMVSS 205 preempts Respondents' glazing claim.

B. FMVSS 208 preempts the seatbelt claim.

1. FMVSS 208 is not silent with respect to passenger seatbelts on motorcoaches.

Respondents claim that "[t]here is simply no federal regulation that applies to occupant protection in large motorcoaches." (Opp. 11) But FMVSS 208 is not silent with respect to seatbelts on motorcoaches.[4]

FMVSS 208, entitled "Occupant crash protection," applies to all vehicles and contains no exclusions for large buses or passenger seating positions. *See* 49 C.F.R. § 571.208 ("This standard applies to

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[4] Respondents' claim suggests that NHTSA forgot about or decided not to deal with this issue. Nothing could be further from the truth.

passenger cars, multipurpose passenger vehicles, trucks, and buses."). As Respondents point out, NHTSA knew how to exclude large vehicles or passengers from a regulation. (Opp. 10–12) For example, in FMVSS 207 regarding seating systems, NHTSA expressly excluded passenger seating positions from the regulation's scope. 49 C.F.R. § 571.207, S4.2 (stating general performance requirements applicable to all occupant seats "except" four seating positions, including "a passenger seat on a bus other than a school bus"). In contrast, FMVSS 208 requires seatbelts or other occupant protection for drivers and does not require them for passengers. 49 C.F.R. § 571.208, S4.4.2. The decision not to require passenger seatbelts is different from excluding passenger seating positions from the regulation. Unlike in *Sprietsma* and *Freightliner*, there is no regulatory silence in this case.

Respondents point to other regulations that exclude vehicles over 10,000 pounds, such as the motorcoach at issue here. *See* 49 C.F.R. §§ 571.201 ("Occupant protection in interior impact"), 202 ("Head restraints"), 214 ("Side impact protection"), and 216 ("Roof crush resistance"). The fact that these regulations do not apply to vehicles weighing more than 10,000 pounds does not demonstrate a lack of regulation of occupant protection in motorcoaches. If anything, it shows that NHTSA determined that large vehicles, by virtue of their size and weight, do not need the additional structural requirements. The bottom line is that FMVSS 208 applies to large

motorcoaches, as do numerous other Safety Act regulations.[5]

In addition, the 1992 Rice letter is helpful. It shows that NHTSA's chief counsel believed, two years before the bus in question was manufactured, that a regulation existed for passenger seatbelts on motorcoaches. In other words, the letter confirms that FMVSS 208 is *not* silent. The Texas Supreme Court dismissed the significance of this letter, noting instead that the letter did not indicate an affirmative opposition to seatbelts. (Pet. App. 31–32)

2. FMVSS 208's regulatory history does not show inaction; it shows a decision not to require passenger seatbelts on motorcoaches.

FMVSS 208's regulatory history, as outlined in MCI's petition, does not show "30 years of regulatory inaction." (*See* Opp. 12) It instead shows that NHTSA decided not to require passenger seatbelts, which is different from leaving "passenger seating completely unregulated." (*See* Opp. 13) This is emphasized by the 1974 NPRM, which states that motorcoaches were safe without seatbelts and that NHTSA would require them in the future "if it found them desirable." 38 Fed. Reg. 4776 (Feb. 22, 1973) (codified at 49 C.F.R. pt. 571).

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[5] *See, e.g.*, 49 C.F.R. §§ 571.101, 102, 103, 104, 105, 106, 108, 111, 113, 116, 120, 121, 124, 125, 126, 204, 205, 217, 302.

In addition, whether NHTSA formally studied the issue again before 2000 does not affect the analysis. The test under *Williamson* is whether there was a significant regulatory objective behind the regulation. The analysis does not hinge on how recently the agency stated that objective.

3. NHTSA's decision not to require passenger seatbelts was a significant objective.

The preemptive effect of FMVSS 208 turns on whether NHTSA's decision not to require passenger seatbelts, based on a safety determination, was a significant regulatory objective. Respondents contend that this issue is controlled by *Sprietsma* and *Freightliner*. But those cases do not involve a regulatory decision not to require a safety device; they involve a complete absence of a regulation.

In *Sprietsma*, the Coast Guard rejected a propeller guard proposal—because of a lack of data—and instead decided to allow states to continue to regulate the area. *Sprietsma*, 537 U.S. at 65–66. There was no propeller guard regulation at all. The Coast Guard did not comment about the desirability of propeller guards or require them only for some size propellers. If the Coast Guard had determined that a guard was necessary for some kinds of propellers but not others, because they were already safe, that would be more like this case. Here, NHTSA determined that seatbelts were needed at passenger seating positions in smaller vehicles but were not necessary for safety or desirable

in large vehicles weighing over 10,000 pounds. 38 Fed. Reg. 4776. Not requiring passenger seatbelts in one seating position, based on such a safety determination, is different from a failure to regulate seatbelts altogether.

In *Freightliner*, the plaintiffs alleged that a tractor-trailer was defective because it did not contain an antilock braking system (ABS). 514 U.S. at 282. The defendant claimed that FMVSS 121, the safety standard governing braking distance requirements, preempted the claim. In fact, NHTSA had tried to require ABS systems on all trucks but the Ninth Circuit made NHTSA withdraw the regulation on procedural grounds. That history is the polar opposite of the history here. This Court held that the claims were not impliedly preempted because the standard "simply fails to address the need for ABS devices at all" and "currently has nothing to say concerning ABS devices one way or the other." *Id.* at 289. In contrast, FMVSS 208 does have something to say concerning seatbelts and does not exclude large buses or passenger seating positions. It regulates seatbelts on motorcoaches, requiring them at the driver seat but not at passenger seating positions.

In sum, NHTSA made a safety determination that passenger seatbelts on large motorcoaches were not necessary and, thus, did not require them. In addition, this case involves the interstate and intercity nature of motorcoaches, which uniquely impacts "Congress's goal of establishing uniform standards on which the motor vehicle industry can rely." *Surles v. Greyhound Lines, Inc.*, No. 4:01-cv-00107,

2005 U.S. Dist. LEXIS 45765, at *17–18 (E.D. Tenn. 2005). Because NHTSA's decision regarding passenger seatbelts on large buses is supported by significant federal regulatory objectives of safety and uniformity, it preempts Respondents' state law claim.

PRAYER

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas C. Wright
Counsel of Record
Wanda McKee Fowler
Michael Choyke
Bradley W. Snead
WRIGHT & CLOSE, LLP
Three Riverway, Suite 600
Houston, Texas 77056
Telephone: (713) 572-4321
Facsimile: (713) 572-4320
wright@wrightclose.com

J. Brett Busby
BRACEWELL & GIULIANI LLP
711 Louisiana Street,
Suite 2300
Houston, Texas 77002

Darrell L. Barger
HARTLINE DACUS BARGER
DREYER LLP
North Tower
800 N. Shoreline Blvd.,
Suite 2000
Corpus Christi, Texas
78401

John C. Dacus
HARTLINE DACUS BARGER
DREYER LLP
6688 N. Central Expressway,
Suite 1000
Dallas, Texas 75206

Attorneys for Petitioners